

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	
SAMPSON SUNNY OLUKUNLE)	Chapter 13 Case
)	Number <u>96-42079</u>
<i>Debtor</i>)	

MEMORANDUM AND ORDER

FINDINGS OF FACT

On August 21, 1996, Debtor filed this Chapter 13 case. Debtor had filed previously for Chapter 13 bankruptcy on two other occasions. On April 15, 1994, Debtor first filed for Chapter 13 protection, Case No. 94-40637, and subsequently dismissed that case voluntarily on February 9, 1995. That case was confirmed at a 100% dividend to unsecured creditors. One day later, on February 10, 1995, Debtor again filed for bankruptcy, Case No. 95-40272, and voluntarily dismissed the case on August 21, 1996, the same day that Debtor filed his third Chapter 13. The second case was confirmed at an 18% dividend. Apparently, during the pendency of Debtor's second case, Debtor purchased an automobile from Holiday Sales, Inc., without Court approval in violation of the Confirmation Order in this District. Debtor defaulted on the loan agreement shortly thereafter and when Holiday Sales commenced state court collection proceedings on their post-petition debt Debtor

dismissed his previous case and refiled immediately. In this third case, Debtor proposes to pay unsecured creditors a dividend of 100%.

In response to Debtor's recent filing, the Chapter 13 Trustee filed a Motion to Dismiss with Prejudice claiming that Debtor's third filing is in bad faith and that Debtor should be barred from refiling for 180 days. Included within her objection, Trustee attached as exhibit 'A' a copy of the sales agreement entered into between Debtor and Holiday Sales. On December 18, 1996, this Court held a hearing on confirmation and the Trustee's Motion to Dismiss. At the hearing, Debtor testified that his automobile broke down during the pendency of Debtor's second case. Debtor then visited Holiday Sales, Inc., and notified the salesperson that he was in bankruptcy and that Holiday Sales responded by stating that "they would work with him." Debtor purchased a 1987 Oldsmobile Delta 88 for \$150.00 cash down payment and seventy bi-weekly payments of \$150.00. Debtor testified that at the time he believed he was entering into a lease and not a purchase of the automobile, although he did not read the financing documents prior to signing them. Debtor also testified that he did not consult with his bankruptcy attorney at the time he purchased the vehicle. Debtor recently has surrendered the vehicle to Holiday Sales. There was no appearance by Holiday Sales to refute Debtor's sworn testimony.

The issue presented is whether Debtor's Chapter 13 case was filed in good

faith pursuant to 11 U.S.C. § 1325(a)(3) when Debtor purchased a vehicle during the pendency of his previous Chapter 13 without the required approval of the Court and voluntarily dismissed that case and refiled a new one to surrender the vehicle. Trustee contends that Debtor's purchase of the vehicle violated the terms of the July 18, 1995, Confirmation Order and, therefore, Debtor should be excluded from further protection of the bankruptcy law, i.e. barred from refiling for 180 days. In support of her position, Trustee relies on the case of In re Kitchens, 702 F.2d 885 (11th Cir. 1983), for the proposition that Debtor has not filed his case in good faith. Debtor opposes this result requesting that the Court confirm his plan at a 100% dividend. Debtor contends that any violation of the Court's previous Order was not wilful and, thus, Debtor should be allowed to remain in Chapter 13.

CONCLUSIONS OF LAW

_____ In pertinent part, 11 U.S.C. Section 1325(a)(3) provides,

(a) Except as provided in subsection(b), the court shall confirm a plan if--

(3) the plan has been proposed in good faith . . .

11 U.S.C. § 1322. In Kitchens, the Eleventh Circuit Court of Appeals held that in determining whether a proposed Chapter 13 plan meets the "good faith" requirement, a court

must at least consider certain factors including (5) the motivations of the debtor and his sincerity in seeking relief (6) the debtor's degree of effort, (9) the frequency which the debtor has sought bankruptcy relief, and (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealing with his creditors. In re Kitchens, 702 F.2d at 889.

Trustee contends that because this bankruptcy is the Debtor's third filing and Debtor previously violated the Court's order during his second bankruptcy this case is filed in bad faith. Debtor on the other hand notes that Section 109(g) bars refiling for 180 days if a Court dismisses a debtor's previous case because of a wilful failure to follow a Court's order. Debtor asserts that in the present instance his second case was not dismissed by the Court and additionally that any previous violation of the Court's confirmation order was not wilful. *See In re Hollis*, 150 B.R. 145 (D.Md. 1993) (holding that debtor's failure to make \$300 payment was not a wilful violation of Section 109(g)); *see also In re Faulkner*, 187 B.R. 1019 (Bankr.S.D.Ga. 1995) (holding that a violation of a strict compliance order is not the type of order which gives rise to the bar to refiling contained in Section 109(g)(1)). Debtor also contends that his willingness to propose a plan that pays all creditors in full demonstrates his good faith.

After weighing the factors enumerated by the Eleventh Circuit Court of

Appeals in Kitchens, I hold that Debtor's third case was not filed in good faith and accordingly sustain the Trustee's objection. Bankruptcy Code Section 109(g) automatically bars a debtor from refiling for 180 days if "the case was dismissed by the court for wilful failure of the debtor to abide by orders of the court." 11 U.S.C. § 109(g). However, Section 109(g) is not the only filing restriction placed on a debtor. To be eligible for Chapter 13, a debtor must also comply with the provisions of Section 1325(a), including its good faith requirement. When assessing whether the case was filed in good faith, a court may consider a debtor's pre-petition conduct. *See Matter of Smith*, 848 F.2d 813, 819 (7th Cir. 1988) (holding that debtor's pre-filing conduct is relevant towards determining good faith). In instances where the debtor engages in repeated and potentially abusive filings, a court should inquire into the motives and sincerity of the debtor to determine whether he should be afforded Chapter 13 protection. *See In re Kitchens*, 702 F.2d at 889 (holding that a court should consider debtor's motivations and sincerity in seeking relief).

Here, Debtor has filed his third consecutive Chapter 13 with no more than one day between each filing. By his own admission, Debtor testified that he violated the Court's previous confirmation order. Although Debtor's counsel contends that any violation was committed unknowingly, after reviewing the sales contract entitled "Bill of Sale," I hold that Debtor in fact wilfully violated the Court's previous Confirmation Order. Although the Debtor may not have comprehended fully the nature of the sales transaction, he entered it

voluntarily, in violation of this Court's confirmation order. His actions were willful and intentional or so recklessly indifferent to his obligations as a Chapter 13 debtor as to constitute bad faith.

Debtor also contends that his proposal to pay a dividend of 100% to unsecured creditors evidences good faith. Although an increase of the dividend from the 18 to 100% is relevant to the Court's consideration of good faith, I find that it does not outweigh the evidence supporting dismissal of this case. Specifically, since April 15, 1994, Debtor's repeated filings have granted him the continuous protection of the bankruptcy laws. Over this same period of time, Debtor wilfully violated the Court's Confirmation Order by incurring additional debt without court approval.¹ Debtor now requests permission to refile in order to include within his plan the same debt incurred in violation of court order. In other words, Debtor seeks the benefit of Chapter 13 without a willingness to shoulder its burdens. These actions evidence bad faith that cannot be overlooked. *See Matter of Williams*, Ch. 13 Case No. 95-42630, slip op. at 4 (Bankr.S.D.Ga., Sept. 25, 1996) (Davis, J.) (holding that "when Debtor elected to borrow money without authority of the Court, she was not entitled to the protection of Chapter 13 for that debt").

¹ Paragraph three of the Confirmation Order of the Southern District of Georgia clearly states, "[d]ebtor shall not incur any indebtedness without the approval of the Court or the Trustee."

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THE COURT that the Chapter 13 Trustee's Motion to Dismiss is sustained.

IT IS THE FURTHER ORDER OF THIS COURT that the case of Debtor, Sampson Sunny Olukunle, is hereby dismissed with prejudice and barred from refile for a period of 180 days.

Lamar W. Davis, Jr.,
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of January, 1997.